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Supreme Court, U.S.
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No. 02-1848

In the

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND SAN REMO HOTEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), prevent a property owner from raising a takings claim under the federal Constitution in federal court, as an initial matter, when the defendant may directly remove such a claim from state court to federal court?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation and San Remo Hotel respectfully submit this brief amicus curiae in support of Petitioner, Franklin P. Kottschade.[1]

San Remo Hotel is a privately owned hotel located in San Francisco, California. For more than a decade, San Remo has tried to get a federal court to rule on its claim that it suffered a taking under the federal Constitution when the City of San Francisco demanded a payment of $567,000 as a condition of a land use permit. San Remo has attempted to invoke original jurisdiction; it has tried to secure jurisdiction after unsuccessfully pursuing just compensation in state courts; it has even attempted to reserve its federal claims for federal review under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), while permitting the state courts to resolve its state law takings claims. So far, nothing has worked.

As of this writing, San Remo continues to plead, once again to the Ninth Circuit, for a chance to have its significant federal constitutional claims heard on the merits. Based on its experience, San Remo believes that the lower courts are in desperate need of guidance on the scope and applicability of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). It urges this Court to use the present case to give that guidance.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

in America. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 533 U.S. 948 (2001).

PLF believes that its litigation experience will provide an additional valuable viewpoint on the issues presented in this case. Amici PLF and San Remo Hotel seek to focus this Court's attention on the federal jurisdictional black hole into which *Williamson County* draws a takings claimant and the inexplicable removal exception provided only to government defendants.

INTRODUCTION

This case squarely presents a disturbing dichotomy in federal jurisdiction over claims arising under the Takings Clause. Since this Court's decision in *Williamson County*, American property owners like Mr. Kottschade have been told that they cannot bring a takings claim in federal court until they have sought just compensation from the state because the federal claim will not ripen until the state denies compensation. Yet, when plaintiffs follow these directions, they are often told that they cannot get into federal court at all because the prior state proceedings preclude further litigation in the federal forum. On the other hand, federal courts have thrown open their doors to a *government defendant* that seeks to remove to federal court a takings claim that is initially filed in state court

and which should be unripe, under the reasoning applied to plaintiffs.

In *City of Chicago v. College of Surgeons*, 522 U.S. 156 (1997), this Court seemed to sanction such permissive removal of takings claims without explaining how such a doctrine can be logically or equitably reconciled with the ripeness barriers imposed on plaintiffs. The resulting tension between the barriers imposed on plaintiffs and the open-door policy for defendants has produced absurd and unfair results. This case provides the Court with an opportunity to address the festering jurisdictional dichotomy created by *Williamson County* and *College of Surgeons* and to bring consistency and justice to this area of the law.

ARGUMENT

I

WILLIAMSON COUNTY HAS STRANDED ONE CLASS OF CONSTITUTIONAL PLAINTIFFS—PROPERTY OWNERS—IN THE STATE COURTS

Property owners who have followed *Williamson County*'s apparent instruction to (unsuccessfully) seek compensation from the state before filing a takings action in federal court have been subjected to a cruel trick: the very act of engaging in the state litigation required by *Williamson County* has often served to end, rather than mature, their chance for federal review.

When the owner fails to obtain compensation from the state, many federal courts have applied *claim* preclusion to deny subsequent jurisdiction of the "ripened" takings claim. *See, e.g., Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1324-25 (10th Cir. 1998). Recognizing the tension between this result and *Williamson County*, other courts have suggested an escape: a takings claimant can reserve federal claims for later federal adjudication, under this Court's decision in *England* or

otherwise, at the time of the state court litigation. *See, e.g., Dodd v. Hood River County* (*Dodd I*), 59 F.3d 852, 862-63 (9th Cir. 1995). Yet, when the property owner pursues this new promise, courts have dropped the other shoe: a proper reservation does not necessarily prevent dismissal of the supposedly-ripened and reserved federal claims on grounds of *issue* preclusion. *See, e.g, Dodd v. Hood River County* (*Dodd II*), 136 F.3d 1219, 1223-24 (9th Cir. 1998).

Even the most careful litigant may discover that *Williamson County* absolutely forecloses federal jurisdiction in practice, if not in theory. The experiences of San Remo Hotel illustrate how far some federal courts will go in applying *Williamson County* to bar takings claims.

In the early 1990's, the City of San Francisco demanded a $567,000 fee, pursuant to a local ordinance, in return for a permit that would allow San Remo to convert some residential hotel rooms to tourist use. *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 95 (Cal. 2002). Since then, San Remo has been subjected to a maze of jurisdictional dead-ends in a (so-far) vain attempt to get a federal court to resolve its claim that this exaction amounted to a taking in violation of the Fifth Amendment to the United States Constitution.

The hotel initially filed a complaint in federal district court, alleging that the conversion fee ordinance violated the United States Constitution on its face and as applied to the hotel. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998). All of the takings claims except for one facial claim were dismissed for lack of jurisdiction because the hotel had not yet attempted to secure just compensation through state court procedures, in accordance with *Williamson County*. *Id.* at 1101-03. To the extent that the hotel's facial taking claim rested on the theory that the challenged conversion ordinance did not "substantially

advance legitimate state interests," the court invoked *Pullman* abstention, thus withholding jurisdiction pending litigation of San Remo's other claims in state court. *Id.* at 1102.

San Remo then dutifully attempted to ripen its federal takings claims by seeking compensation under California state law. *See San Remo Hotel v. City and County of San Francisco*, 41 P.3d at 91. In so doing, San Remo explicitly reserved its federal takings claims under *England*, for later federal review. When the California Supreme Court denied San Remo's claim for compensation in 2002, the court recognized the reservation and carefully stressed that its decision arose from interpretation of the takings provision in the California Constitution, not the parallel clause of the Fifth Amendment. *See San Remo*, 41 P.3d at 90 n.1; *id.* at 118 (Baxter, J., concurring in part and dissenting in part) ("Plaintiffs have reserved their federal claims").

After the adverse state decision, San Remo returned to federal court to reassert its properly reserved federal takings claims. The hotel's meticulous adherence to *Williamson County* and *England* was not sufficient, however, to convince the Federal District Court for the Northern District of California to exercise its jurisdiction over San Remo's federal claims. Relying on the doctrine of issue preclusion, the court held that the state court litigation engaged in pursuant to *Williamson County* prevented the District Court from hearing San Remo's Fifth Amendment claims, the proper *England* reservation notwithstanding. Incredibly, the court applied issue preclusion because it believed the California Supreme Court had resolved San Remo's state case under federal law, even though the state court's opinion expressly stated that "*no federal question* has been presented or decided in this case." *San Remo*, 41 P.3d at 91 n.1 (emphasis added).

The same type of *Williamson County*-inspired jurisdictional confusion seen in San Remo's case has infected

equal protection and substantive due process, as well as takings claims arising in a land use context. *See, e.g., Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (requiring plaintiff to pursue a compensation claim in state court before raising a substantive due process or equal protection claim in federal court). The prevailing message is that federal courts will require property owners to rely solely on the state courts to protect them from constitutional violations by local and state government entities.

II

COLLEGE OF SURGEONS APPEARS TO AFFIRM AN IRRATIONAL AND UNFAIR EXCEPTION TO *WILLIAMSON COUNTY* FOR GOVERNMENT DEFENDANTS

Property owners do have one slim hope for obtaining federal jurisdiction, a hope that depends on the whim of their opponents. If the government decides to remove a constitutional claim to federal court for its own purposes, the plaintiff may have a rare opportunity to present a takings, or other constitutional claim to the court. This is because the federal judiciary, including this Court, generally have allowed defendants to remove takings claims free from *Williamson County*'s restrictions. *See College of Surgeons*, 522 U.S. at 164.

No one has yet explained how such permissive removal can exist in the post-*Williamson County* takings world. Removal of a claim by defendants is only proper, after all, if the court would have had jurisdiction over the complaint. *See College of Surgeons*, 522 U.S. at 163 ("The propriety of removal thus depends on whether the case originally could have been filed in federal court."). But the courts have repeatedly said that they *do not* have jurisdiction over a takings complaint, when filed by a plaintiff in the first instance, because of *Williamson County*. There is no intelligible basis for a

complete reversal of policy when it is the defendant that presents the complaint by removal.

Not surprisingly, the unresolved tension between the lack of any apparent *Williamson County* limitation on removal and the severe restrictions imposed on plaintiffs sometimes explodes. The resulting impact almost always falls on the property owners. In *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623 (5th Cir. 2003), for instance, a federal district court allowed the government to remove state and federal takings claims. *Id.* at 625. The parties then filed competing motions for summary judgment and the court ruled in favor of the landowner. *Id.* at 625-26. But on appeal, the circuit court relied on *Williamson County* and held that the landowner's claims were not ripe because the owner did not seek compensation in state court. *Id.* at 626. The owner was therefore sent all the way back to the state court where it started and where it would have remained if not for the government's apparent right to remove a federal takings claim. *Id.*

A similar debacle occurred in *Seiler v. Charter Township of Northville*, 53 F. Supp. 2d 957 (E.D. Mich. 1999). There, a landowner filed a takings action in state court, only to have it removed to federal court, without difficulty, by the government defendant. *Id.* at 960. But, unlike in *Sandy Creek*, the government actually had the audacity then to argue that the takings claims were unripe because the plaintiff had not yet fulfilled *Williamson County*'s command to first seek compensation in state court. *Id.* at 962. Even more incredibly, the federal court agreed, thus permitting the government to drag the plaintiff into a federal forum, which was supposedly initially (if not always) unavailable to the plaintiff, only so that it could have the plaintiff kicked back to the state forum (where the plaintiff dutifully started in accordance with *Williamson County*), thereby forcing the plaintiff to expend precious resources litigating in a forum it never sought. *Id.*

Permitting the free removal of takings claims, without addressing *Williamson County*, allows government defendants to whipsaw plaintiffs with the conflicting decisions of this Court and, ultimately, to defeat their constitutional claims by jurisdictional attrition. The lynchpin of this sad situation is the decision in *Williamson County*, not *College of Surgeons* or the removal rule generally. By appearing to require takings plaintiffs to litigate first in state court, without discussing what happens after this occurs, *Williamson County* created a vacuum with respect to how its unique rule is to interact with the pre-existing web of jurisdictional doctrine. The federal courts have naturally attempted to fill this vacuum. In so doing, they have established an unjust, contradictory, and inconsistent jurisdictional framework, one that tells plaintiff property owners that they should expect no protection for their federal constitutional rights from the federal courts, except (maybe) when the defendant believes federal jurisdiction is advantageous to its own case. This scheme is incompatible with "[t]he concepts of 'fairness and justice' that underlie the Takings Clause," *Palazzolo v. Rhode Island*, 533 U.S. at 633 (O'Connor, J., concurring), and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals.

DATED: July, 2003.

Respectfully submitted,

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